Supreme Court, U. S.
FILED
SEP 18 1980
MICHAEL RODAK, JR., CLERK

No. 79-1900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD JAMES FREEMAN,

Petitioner,

vs.

O'NEAL STEEL, INC., a corporation,
and UNITED STEELWORKERS OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF RESPONDENT O'NEAL STEEL IN OPPOSITION TO PETITION

LUCIEN D. GARDNER, JR.
WILLIAM F. GARDNER
R. BOYD MILLER
Attorneys for Respondent
O'Neal Steel, Inc.

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Opinions Below	1
Counterstatement of Questions Presented	2
Counterstatement of the Case	2
A. Facts	2
B. District Court Decision	4
C. Court of Appeals Decision	6
Summary of Argument	7
Argument	8
I. Petitioner's Argument That the Fifth Circuit Refuses to Apply FRCP 52(a) is Without Merit	8
II. Petitioner's Argument That the Fifth Circuit Applies a Standard Different from Other Circuits is Without Merit	13
III. The Rulings of the Fifth Circuit in Fair Representation Cases are Entirely Consistent with Vaca v. Sipes and Hines v. Anchor Motor Freight	15
IV. Petitioner's Argument That the Court of Appeals Erred in Not Holding the Evidence Established a Breach of the Fair Representation Duty is Without Merit	19
Conclusion	21
Certificate of Service	22

TABLE OF AUTHORITIES

A. Cases:

Abilene Sheet Metal, Inc. v. NLRB, 619 F.2d 332 (5th Cir. 1980) 18

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) .. 12

Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971) 19

Bazarte v. United Transportation Union, 429 F.2d 868 (3rd Cir. 1970) 20

Buchanan v. N.L.R.B., 597 F.2d 388 (4th Cir. 1979) ... 11

Burchfield v. United Steelworkers of America, 577 F.2d 1018 (5th Cir. 1978) 17

Bures v. Houston Symphony Society, 503 F.2d 842 (5th Cir. 1974) 17

Coe v. United Rubber Workers, 571 F.2d 1349 (5th Cir. 1978) 17

Connally v. Transcon Lines, 584 F.2d 199 (5th Cir. 1978) 17

Cox v. C. H. Masland & Sons, Inc., 607 F.2d 138 (5th Cir. 1979) 17

Encina v. Tony Lama Boot Co., 448 F.2d 1264 (5th Cir. 1971) 17

Franklin v. Crosby Typesetting Co., 568 F.2d 1098 (5th Cir.), cert. denied, 439 U.S. 847 (1978) 17

Fristoe v. Reynolds Metal Co., 615 F.2d 1209 (9th Cir. 1980) 20

Harris v. Chemical Leaman Tank Lines, Inc., 437 F.2d 167 (5th Cir. 1971) 17

Hester v. Southern Railway Co., 497 F.2d 1374 (5th Cir. 1974) 16

Hilliard v. Armco Steel Corp., 421 F.Supp. 658 (W.D. Pa.), aff'd 532 F.2d 746 (3rd Cir. 1976) 9

Hines v. Anchor Motor Freight, 424 U.S. 568 (1976) ... 6,7 15,16,18,19

Humphrey v. Moore, 375 U.S. 335 (1964) 10

International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1979) 10

Janigan v. Taylor, 344 F.2d 781 (1st Cir. 1965), cert. denied, 382 U.S. 879 (1965) 12

Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967) 18

Lomax v. Armstrong Cork Co., 433 F.2d 1277 (5th Cir. 1970) 17

Melendy v. United States Postal Service, 589 F.2d 256 (7th Cir.), cert. denied, 436 U.S. 927 (1978) 11

Moore v. Chesapeake & Ohio R. Co., 340 U.S. 573 (1951) 11

Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972) . 9

Mumford v. Glover, 503 F.2d 878 (5th Cir. 1974) 17

New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) 16

Nishikawa v. Dulles, 356 U.S. 129 (1958) 11

NLRB v. Pittsburgh Steamship Co., 340 U.S. 498 (1951) 15

Robesky v. Quantos Empire Airways, Ltd., 573 F.2d 306 (6th Cir. 1975) 14,15

Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975) 13,14

Sanderson v. Ford Motor Co., 483 F.2d 102 (5th Cir. 1973) 17

Simberlund v. Long Island R.R. Co., 421 F.2d 1219 (2nd Cir. 1970) 9

Soto Segarra v. Sea Land Service Co., Inc., 581 F.2d 291 (1st Cir. 1978) 15

Tedford v. Peabody Coal Co., 533 F.2d 952 (5th Cir. 1976) ..17

Turner v. Air Transport Dispatchers Ass'n, 468 F.2d 297 (5th Cir. 1972) 17

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 12

Vaca v. Sipes, 386 U.S. 171 (1967) 7,8,10,15,16,18

Watson v. International Brotherhood of Teamsters, 399 F.2d 875 (5th Cir. 1968) 17

Willets v. Ford Motor Co., 583 F.2d 852 (6th Cir. 1978) 14

B. Other:

Boyce, Fair Representation, the NLRB, and the Courts (1978) 14,18

5A Moore's Federal Practice 7,8

No. 79-1900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD JAMES FREEMAN,

Petitioner,

vs.

O'NEAL STEEL, INC., a corporation,
and UNITED STEELWORKERS OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF RESPONDENT O'NEAL STEEL IN OPPOSITION TO PETITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit on January 15, 1980 is reported at 609 F.2d 1123. The opinion of the District Court for the Northern District of Alabama on June 30, 1977, which was reversed by the Court of Appeals, is reported at 436 F.Supp. 607.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Since Petitioner's formulation of the questions consist principally of argument and assertions at variance with the record, they cannot be accepted. We submit that the question presented is simply whether the Court of Appeals' decision was within the legal principles governing a claim of alleged breach of the duty of fair representation by a union and alleged breach of a collective bargaining agreement by an employer.

COUNTERSTATEMENT OF THE CASE

The facts of the case are accurately stated in the Court of Appeals' opinion, and since Petitioner does not take issue with the facts as stated by the Court of Appeals, it should be unnecessary to recite the facts here.

Nevertheless, because Petitioner fails to set forth a number of undisputed facts, it is appropriate to present the following brief synopsis of the pertinent facts in order to show that the picture painted by Petitioner is far from accurate and to assist this Court in gaining a true understanding of the material facts in this case.[1]

A. Facts

On January 3, 1975, Petitioner R. J. Freeman ("Freeman") and another employee at O'Neal Steel engaged in a fight on Company premises. (R. 61-65, 235-240). The Company conducted an investigation of the incident and took statements from employees (all Union members) who witnessed all or parts of the fight. (R. 138, 235-240). On the basis of the investigation, the Company discharged both employees. Assisted by the Union, Freeman filed a grievance requesting reinstatement. (R.

---

[1] It should be emphasized that these are undisputed facts; when necessary, a material dispute is recognized.

69, 166, 244). The other employee declined to file a grievance, saying that both parties were guilty in the fight. (R. 13, 154-155). The grievance was filed in the second step of the grievance procedure. (R. 231, 244). It was denied by the Company and was appealed to the third step by the Union. (R. 231, 246).

Before the third step meeting, the Union requested copies of the statements the Company had taken from the witnesses to the fight. (R. 177, 231). Freeman was informed of the contents of these statements by the Union and asked if he knew of other witnesses that could help his case. He identified two other employees as potential witnesses and, in addition, asked the Union to check with the employees who had given the statements to see if they would repudiate their statements or "change their testimony." (R. 148-150, 179). The Union thereafter sought out the witnesses identified by Freeman, but neither had any personal knowledge of the incident. (R. 49, 150, 185). The Union also interviewed the employees who had given statements concerning the fight. (R. 172, 179, 201). Each of these employees stood by his statement as correct, and the employee closest to the fight stood by his statement that Freeman had been an active participant and had struck the first blow in the affray.[2] (R. 44-45, 138, 179, 202).

Also prior to the third step meeting, the Union met with Freeman to discuss the matter and conducted a mock reenactment of the fight. (R. 167, 168, 180, 181). At the third step meeting, the Union advocated Freeman's cause and made a plea for leniency from the Company. (R. 231). After the grievance was denied at the third step, the Union notified the Company that it was taking the case to arbitration. (R. 249). It was un-

---

[2] The undisputed evidence shows that Freeman went to a Union meeting during this period and openly chastised Union members for giving the statements. (R. 211).

disputed that since the collective bargaining agreement contains time limits on the processing of a grievance, the Union had to take this step to keep the grievance within those time limits and that it is common for grievances to be appealed to arbitration and then withdrawn. (R. 26, 209, 232).

On March 21, 1975, three members of the Union Committee met with Union Representative William Caldwell to discuss a number of pending matters, including Freeman's grievance. (R. 28-29, 191).[3] They discussed the grievance and agreed that in light of, among other things, the statements adverse to Freeman given by witnesses to the fight (which the witnesses declined to repudiate despite Freeman's efforts to have them do so) and prior arbitration cases upholding discharges for fighting, the grievance would probably be lost and therefore should be withdrawn. (R. 29, 173-174, 206-207).

B. District Court Decision

Freeman thereafter sued the Union and the Company, alleging that the Union had breached its duty of fair representation and that the Company had breached the collective bargaining agreement. (R. 1). The case was tried non-jury on January 24, 1977. Several months later, on June 30, 1977, the District Court entered a Memorandum Opinion holding that:

(1) The Union violated the duty of fair representation because:

(a) the plaintiff possessed an excellent chance of winning the arbitration. (R. 220).

(b) it was certainly arbitrary for the Union not to proceed at least to the point of selecting an arbitrator. (R. 220).

---

[3] The local union president, Louis Walters, was unable to attend that day due to personal matters. (R. 190).

(c) Union representative William Caldwell displayed a hostile attitude toward the plaintiff while testifying at the trial. (R. 220).

(d) Union representative Caldwell's actions and demeanor displayed racial bias. (R. 221).

(2) The plaintiff was discharged in breach of the collective bargaining agreement. The District Court based this holding on a criminal law principle, stating that:

> "[T]his court recognizes the well-established right of a person to defend himself from a felonious attack and the theft of his property, whatever its value. As the court in *State* v. *Wilson,* 62 A. 227, 5 Pennewill 77 (Del. 19),[4] stated,
>
> > 'The law accords to everyone the right to protect his person from assault and injury by posing force to force, and he is not obliged to wait until he is struck by an impending blow; for, if a weapon be raised in order to shoot or strike, or the danger of other personal violence be imminent, the party in such imminent danger may protect himself by striking the first blow for the purpose of repelling and preventing the attempted injury.'
>
> 62 A. at 231. The court specifically finds that plaintiff was acting in defense of his property and that the opposing force or measure of defense which he used was not unreasonably disproportionate to the requirements of the occasion. He clearly should not have been discharged by O'Neal for the assertion of this right." (R. 222).

---

[4] The date of the decision in the case cited by the District Court was omitted in the District Court's Memorandum Opinion.

C. Court of Appeals Decision

On appeal, a unanimous panel of the Court of Appeals reversed on the ground that the District Court's decision was not in conformity with the principles governing cases alleging a breach of the fair representation duty and that there was not substantial evidence of a breach of the duty by the Union. Since this was conclusive of the case,[5] there was no occasion to reach the point that the District Court's use of the criminal law "armed robbery" theory to decide the grievance was contrary to the principle that a court, in performing the function of a labor arbitrator, is confined to the collective bargaining agreement and that a ruling based on anything else is unenforceable.

---

[5] "To prevail against either the company or the Union, petitioners must show not only that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." *Hines* v. *Anchor Motor Freight,* 424 U.S. 568 (1976).

SUMMARY OF ARGUMENT

Petitioner's first argument, that the Fifth Circuit did not adhere to Rule 52(a) of the Federal Rules of Civil Procedure, is without merit since the appellate courts are clearly not bound to uphold erroneous or irrelevant findings of fact or conclusions of law. 5A *Moore's Federal Practice,* ¶52.03[2], at 2262 (2d ed. 1980).

Petitioner's second argument, that the standard the Fifth Circuit applied in this case is inconsistent with the standards applied in the other Circuits, is similarly devoid of merit since the facts of these cases are not fungible goods and the facts of the cases cited by Petitioner do not parallel the facts of this case.

Petitioner's next argument, that the Fifth Circuit has not been applying the standards of *Vaca* v. *Sipes,* 386 U.S. 171 (1967), and *Hines* v. *Anchor Motor Freight,* 424 U.S. 554 (1976), is based on nothing more than a misleading listing of cases with no attempt to show any way in which those cases allegedly conflict with *Vaca* and *Hines.*

Petitioner's final argument (which is essentially a reiteration of his basic contention), that the Court of Appeals erred in not accepting the District Court's holding that the evidence showed a violation of the fair representation duty, is without merit because the Court of Appeals correctly applied the governing principles. Indeed, it will be evident that it was not the Fifth Circuit's opinion, but rather the District Court's opinion, which contained glaring errors of law making reversal not only necessary but inevitable.

ARGUMENT

I.

Petitioner's Argument That The Fifth Circuit Refuses To Apply FRCP 52(a) Is Without Merit

In response to Petitioner's contention that the Fifth Circuit circumvented FRCP 52(a), it is enough to observe that Rule 52(a) was never intended to limit an appellate court's power to correct errors of law. See 5A *Moore's Federal Practice,* ¶52.03 [2], at 2662 (2d ed. 1980). In this case, the District Court's holding was clearly out of harmony with applicable law as established by this Court and followed by the other Courts of Appeals, and the Court of Appeals was correct in reversing it.

Thus, the District Court's reliance on the opinion that "the plaintiff possessed an excellent chance of winning the arbitration" was contrary to the principle that a union's representation may not be judged by the views of a court as to the merits of the grievance. This Court settled that principle in *Vaca* v. *Sipes,* 386 U.S. 171 (1967), as follows:

> "Quite obviously, the question which the Missouri Supreme Court thought dispositive of the issue of liability was whether the evidence supported Owens' assertion that he had been wrongfully discharged by Swift, regardless of the Union's good faith in reaching a contrary conclusion. This was also the major concern of the plaintiff at trial: the bulk of Owens' evidence was directed at whether he was medically fit at the time of discharge and whether he had performed heavy work after that discharge.—
>
> "[T]he standard applied here by the Missouri Supreme Court cannot be sustained. For if a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the

grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial."

Accordingly, as Justice (then Judge) Stevens stated in *Moore* v. *Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1972):

> "The Supreme Court in Vaca left no doubt that a union owes its members a duty of fair representation, but that opinion also makes it clear that the union may exercise discretion in deciding whether a grievance warrants arbitration. Even if an employee claim has merit, a union may properly reject it unless its action is arbitrary or taken in bad faith."

The application of this principle is also illustrated by the following examples:

> "In resolving the issue of fair representation, appellants seek to involve us in a consideration of the merits of their seniority claim. It is not, however, the function of the court to inquire into the merits of appellants' grievance." *Simberlund* v. *Long Island R. Co.*, 421 F.2d 1219 (2nd Cir. 1970).

* * *

> "The actual propriety of the grievant's discharge is immaterial to the strength of a Vaca-type action; the real issue is whether or not the union acts in good faith when it determines that the discharge is proper within the meaning of the applicable collective bargaining agreement.—This is so even if the grievance has merit." *Hilliard* v. *Armco Steel Corp.*, 421 F.Supp. 658 (W.D. Pa. 1975), aff'd, 532 F.2d 746 (3rd Cir. 1976).

Similarly, the District Court's holding that it was arbitrary for the Union not to proceed to the point of selecting an Arbitrator was manifestly at odds with the principle that a union is not obligated to take a grievance to arbitration. As this Court said in *Vaca* v. *Sipes,* supra:

> "If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully."

This Court similarly stated in *Humphrey* v. *Moore,* 375 U.S. 335 (1964) that:

> "Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes."

Similarly, in 1979, this Court reiterated the reasons underlying the principle. In holding in *International Brotherhood of Electrical Workers* v. *Foust,* 442 U.S. 42 (1979) that punitive damages may not be awarded for a breach of the fair representation duty, the Court stated that:

> "Additionally, the prospect of punitive damages in cases such as this could curtail the broad discretion that Vaca afforded unions in handling grievances. We there rejected the notion that employees could force unions to process their claims irrespective of the terms of the collective-bargaining agreement, and ruled that a union satisfies its

> obligation to represent employees fairly if it does not 'arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion.' Vaca v. Sipes, 386 U.S. at 191-194. In so holding, the Court stressed that union discretion is essential to the proper functioning of the collective-bargaining system. Union supervision of employee complaints promotes settlements, avoids processing of frivolous claims, and strengthens the employer's confidence in the union. Id., at 191, 193. Without these screening and settlement procedures, the Court found that the costs of private dispute resolution could ultimately render the system impracticable. Ibid."

It is accordingly settled that the fair representation duty does not obligate a union to file a grievance, does not preclude the withdrawal of a grievance once filed, and does not require that a grievance be appealed to arbitration. E.g., *Buchanan* v. *N.L.R.B.*, 597 F.2d 388 (4th Cir. 1979) ("The duty to avoid arbitrary conduct does not require a union to take every grievance to arbitration, and it has considerable discretion in sifting out grievances which it regards as lacking merit. Without such discretion, a union's effectiveness as bargaining agent would be undermined.") and *Melendy* v. *United States Postal Service,* 589 F.2d 256 (7th Cir.), cert. denied, 436 U.S. 927 (1978) ("The union need not arbitrate every grievance. Vaca v. Sipes, 386 U.S. 171, 191-192, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). The union has a duty to screen grievances and arbitrate only those the union believes are meritorious. Cf. Moore v. Sunbeam Corp., 459 F.2d 811, 819 (7th Cir. 1972).").

So also, the District Court's conclusion that the Union representative displayed a hostile attitude while testifying at the trial was a wholly impermissible use of courtroom demeanor, not to ascertain credibility, but to find an ultimate fact, contrary to the settled principle of evidence that a court's disbelief of a witness' testimony cannot be used to find a fact contrary to the testimony. *Nishikawa* v. *Dulles,* 356 U.S. 129, 137 (1958); *Moore* v.

Chesapeake & Ohio R. Co., 340 U.S. 573, 576 (1951). As the First Circuit said in explaining the reason for this principle in *Janigan* v. *Taylor*, 344 F.2d 781, 784-785 (1st Cir. 1965), cert. denied, 382 U.S. 879 (1965):

> "The reason must be obvious. Were the rule otherwise a case could be made for any proposition in the world by the simple process of calling one's adversary as a witness and arguing to the jury that he was not to be believed."

Similarly, the District Court's conclusion that the Union Representative was hostile and biased was not only based on a subjective reaction to his courtroom appearance but was as well the post-trial creation of an issue, because there was no allegation having anything to do with race in the complaint or in the pretrial order or at the trial. For example, the District Court's statement (repeated in this Court by the petition) that the Union is "predominately white" was based on no evidence whatever because race was not an issue.

In a like manner, the District Court relied on a "fact" which indisputably was not a fact at all when it stated that Union Representative Caldwell told Freeman "don't call us, we'll call you." There was never any contention that any such statement was made by Union Representative Caldwell. It was evidently a mistaken reference to the testimony of an employee member of the Union Committee who asked Freeman not to call him at night.

Moreover, the District Court's use of the criminal law armed robbery theory to hold that the discharge was in breach of the collective bargaining agreement was at odds with the principle that "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). As this Court said in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974):

> "As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the 'industrial common law of the shop' and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties."

In sum, while Rule 52(a) mandates that findings of fact shall be given controlling weight unless clearly erroneous, it does not require an appellate court to accept findings which are contrary to the governing legal principles, are based on no evidence, and are contrary to undisputed evidence. The District Court's decision was therefore correctly reversed by the Court of Appeals, and there the matter should end.

II.

Petitioner's Argument That The Fifth Circuit Applies A Standard Different From Other Circuits Is Without Merit

Petitioner has attempted to create a conflict in the Circuits situation by asserting that the standards applied by the Fifth Circuit in this type of case are at odds with the standards applied by other Courts of Appeals and that "the time has come for this court to review this case and resolve the conflict currently existing among the circuits." (Petition at p. 10). In actuality, no such conflict exists.

Petitioner cites four cases in support of the contention that the Fifth Circuit applies a standard inconsistent with the other Circuits in fair representation cases. Each of those cases, however, is clearly distinguishable from the present case.

For instance, in *Ruzicka* v. *General Motors Corp.*, 523 F.2d 306 (6th Cir. 1975), the Sixth Circuit held that a union's unexplained failure to prevent a grievance deadline from expiring

constituted a breach of the duty of fair representation. Unlike the present case, in which the Union thoroughly investigated the incident, conducted reenactments of the fight, and appealed the grievance within the time limits, the union in *Ruzicka* did nothing. As the Court in *Ruzicka* explained, "The union made no decision as to the merits of Appellant's grievance, but merely allowed it to expire out of negligence and perfunctory handling." (523 F.2d at 310). Beyond question, the facts in *Ruzicka* in no way parallel the facts of this case, and it cannot be said that the result there reached was inconsistent with that in the present case.[6]

Similarly, the Sixth Circuit's decision in *Willets* v. *Ford Motor Co.*, 583 F.2d 852 (6th Cir. 1978) is inapplicable to this case. There the employee alleged he filed a grievance but the union did nothing. In the present case, the undisputed facts are that the grievance was vigorously prosecuted until the Union determined that it would be futile to continue with an arbitration and therefore withdrew it. Although what Petitioner was told about the Union's action on that date is disputed, it is beyond doubt he knew his grievance was no longer pending. It is equally beyond doubt that the Union actively investigated and pursued his grievance until it was concluded that there was little chance of succeeding at an arbitration.

The Ninth Circuit's opinion in *Robesky* v. *Quantos Empire Airways, Ltd.*, 573 F.2d 1082 (9th Cir. 1978), bears no relation to this case because the facts there showed that plaintiff was prejudiced by the union's negligent failure to inform her that her grievance had been allowed to expire. There, the employer of-

---

[6]See Boyce, *Fair Representation, the NLRB, and the Courts* (1978), page 48:

> "In *Ruzicka,* the union breached its duty on two accounts. It made no decision on the merits and then negligently allowed the filing deadlines to pass."

fered the employee reinstatement without back pay subject to a probationary period. The employee, acting in the belief that her grievance was pending arbitration, refused the employer's compromise offer, only to discover later her grievance was not in fact pending and had been allowed to expire. Unlike the plaintiff in *Robesky,* the Petitioner in this case clearly suffered no such prejudice.

In *Soto Segarra* v. *Sea Land Service Co., Inc.,* 581 F.2d 291 (1st Cir. 1978), the union took no steps whatsoever to process the plaintiff's grievance, refusing to even respond to his letters requesting representation. To attempt to compare the *Soto Segarra* case to this case, in which the Union actively pursued the grievance, is plainly akin to comparing "apples to oranges."

The sum of it is that the Fifth Circuit continues to apply standards of law in fair representation cases that are consistent with the standards of law applied in the other Circuits. Any alleged inconsistencies are merely a product of factual distinctions and nothing more. Compare *NLRB* v. *Pittsburg Steamship Co.,* 340 U.S. 498 (1951):

> "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.' "

III.

The Rulings Of The Fifth Circuit In Fair Representation Cases Are Entirely Consistent With *Vaca* v. *Sipes* And *Hines* v. *Anchor Motor Freight*

Having failed to establish any inconsistencies between the Fifth Circuit's approach to fair representation cases and the approach of other courts, Petitioner next argues that the Fifth Circuit does not adhere to the principles of *Vaca* v. *Sipes,* 386 U.S.

171 (1967) and *Hines* v. *Anchor Motor Freight,* 424 U.S. 554 (1976). The method used by Petitioner consists of listing fair representation cases decided by the Fifth Circuit and then arguing the cases demonstrate a failure to adhere to the applicable principles.

Since Petitioner is thus using the empirical method of presenting statistics from a sample group and drawing an inference therefrom, it is appropriate to point out that the usefulness of statistics "depends on all of the surrounding facts and circumstances" and that such evidence can be misleading. See, e.g., *New York City Transit Authority* v. *Beazer,* 440 U.S. 568, 584-587 (1979); *Hester* v. *Southern Railway Co.,* 497 F.2d 1374, 1379-1381 (5th Cir. 1974). A misleading result can be achieved by any number of means, including unfair comparisons, unrepresentative or inadequate samples, and unwarranted conclusions.[7] In this instance, Petitioner's sample falls prey to several of these pitfalls.

To begin with, Petitioner argues that the cases establish the Fifth Circuit has failed "to find" a breach of the duty of fair representation in the cited cases. We do not understand it to be the obligation of any court to "find" a breach of the duty of fair representation in any case unless the evidence warrants such a finding. But even more to the point, Petitioner has not undertaken any critique of these cases, individually or collectively, and makes no effort to establish that the result which was reached in any of these cases was inconsistent with the decisions in *Vaca* and *Hines.*

Furthermore, Petitioner has to a degree mis-represented the holdings of the cases he presents. Looking at Petitioner's presentation, it would appear at first blush that the Fifth Circuit

---

[7]Croxton and Cowden, *Practical Business Statistics* 38-48 (3rd ed. 1960).

has reversed District Court determinations favoring plaintiffs in all fourteen of these cases. However, the facts are otherwise. Of the fourteen cases cited by Petitioner, ten did nothing more than affirm District Court rulings for defendants in fair representation suits.[8] Another of the cases vacated a preliminary injunction for a plaintiff in a fair representation suit because there was no showing of irreparable injury.[9] Another of the cases remanded a fair representation suit for a new trial.[10] Significantly, in only one of the cases cited by Petitioner did the Fifth Circuit outright reverse a District Court's ruling in favor of a fair representation plaintiff.[11] Petitioner's most egregious error comes, however, in claiming that *Mumford* v. *Glover,* 503 F.2d 878 (5th Cir. 1974) supports the view that the Fifth Circuit does not "find" fair representation violations. In truth, the Fifth Circuit in *Mumford* reversed and remanded a District Court decision which had favored the union and the employer in a fair representation case. Accordingly, the *Mumford* case, if anything, supports the view that the Fifth Circuit will, if necessary, unhesitatingly reverse an error of law which favors a defendant in a fair representation case.

---

[8]*Cox* v. *C.H. Masland & Sons, Inc.,* 607 F.2d 138 (5th Cir. 1979); *Connally* v. *Transcon Lines,* 584 F.2d 199 (5th Cir. 1978); *Burchfield* v. *United Steelworkers of America,* 577 F.2d 1018 (5th Cir. 1978); *Coe* v. *United Rubber Workers,* 571 F.2d 1349 (5th Cir. 1978); *Franklin* v. *Crosby Typesetting Co.,* 568 F.2d 1098 (5th Cir.), cert. denied, 439 U.S. 847 (1978); *Turner* v. *Air Transport Dispatchers Ass'n.,* 468 F.2d 297 (5th Cir. 1972); *Encina* v. *Tony Lama Boot Co.,* 448 F.2d 1264 (5th Cir. 1971); *Harris* v. *Chemical Leaman Tank Lines, Inc.,* 437 F.2d 167 (5th Cir. 1971); *Lomax* v. *Armstrong Cork Co.,* 433 F.2d 1277 (5th Cir. 1970); *Watson* v. *International Brotherhood of Teamsters,* 399 F.2d 875 (5th Cir. 1968).

[9]*Bures* v. *Houston Symphony Society,* 503 F.2d 842 (5th Cir. 1974).

[10]*Sanderson* v. *Ford Motor Co.,* 483 F.2d 102 (5th Cir. 1973).

[11]*Tedford* v. *Peabody Coal Co.,* 533 F.2d 952 (5th Cir. 1976).

Moreover, Petitioner's assertion that there will never be "substantial evidence" to support a finding of unfair representation in the Fifth Circuit is belied by the Fifth Circuit's recent decision in a fair representation case. In *Abilene Sheet Metal, Inc.* v. *NLRB,* 619 F.2d 332 (5th Cir. 1980), the Court held that substantial evidence supported a finding of a breach of the union's duty of fair representation. (619 F.2d at 347).

Finally, it is noteworthy that Petitioner fails to mention the Fifth Circuit's well-known decision in *Local 12, United Rubber Workers* v. *NLRB,* 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967), which established that breach of the fair representation duty constitutes a violation of the National Labor Relations Act.[12]

It is further apparent that the Court of Appeals' decision was entirely in accord with *Vaca* and *Hines.*

This Court held in *Vaca* that "If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined—" and that "we conclude that a union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration." In the present case, the District Court's holding that it was arbitrary not to proceed to the point of selecting an Arbitrator was contrary to that holding of *Vaca,* and the Court of Appeals was right in reversing it. Similarly, *Vaca* held that a subsequent determination that a grievance had merit could not establish a violation of the fair representation duty. In the present case, the District Court's decision was contrary to that principle as well,

---

[12]"The *United Rubber Workers* case was significant because it was the first case in which a federal court sustained the NLRB's exercise of jurisdiction over the duty of fair representation." Boyce, *Fair Representation, the NLRB, and the Courts* (1978), page 33.

thus not only warranting but requiring reversal by the Court of Appeals.

Hines held that where a claim of breach of the union's duty of fair representation has not been resolved and remains to be tried, a claim that there was a breach of contract by the employer may not be dismissed on a theory that the plaintiffs' discharges had been upheld in arbitration, and that has nothing whatever to do with the present case in which Petitioner's claims against the Union and the Company were tried together.

IV.

Petitioner's Argument That The Court Of Appeals Erred In Not Holding The Evidence Established A Breach Of The Fair Representation Duty Is Without Merit

The evidentiary standard to be applied was expressed by this Court in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees* v. *Lockridge,* 403 U.S. 274 (1971) as follows:

> "[F]or such a claim to be made out, Lockridge must have proved 'arbitrary or bad faith conduct on the part of the Union.' Vaca v. Sipes, supra—There must be 'substantial evidence of fraud, deceitful action or dishonest conduct.' Humphrey v. Moore, supra— "[T]he fact that the doctrine—carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives ensures that the risk of conflict with the general congressional policy favoring expert, centralized administration, and remedial action is tolerably slight."

There should be no dispute that the Court of Appeals was entitled to disapprove, not only the District Court's misapplication of the legal principles, but as well the District Court's reliance on a "fact" which indisputably was not a fact,

the District Court's post-trial creation of an issue, and the District Court's subjective assessment of hostility on the basis of courtroom appearance. With those points out of the way, there obviously was nothing which could be regarded as "substantial evidence."

Nevertheless, petitioner asks this Court to hold that the substantial evidence standard ought to have been satisfied by the Union Representative reviewing arbitration cases upholding discharges for fighting and by Petitioner allegedly being told the grievance had been denied by the arbitrator.

With respect to Petitioner's first argument, it should be noted that he has referred to only part of the evidence. The evidence was that the Union gave consideration to all of the facts, including "anything we could pull out of the file that would help us in arbitration of the case." (R. 29). So also, the Union gave consideration to the fact that the Company possessed signed statements by Union members who had told the Union their statements were true and declined to retract them, despite Petitioner's efforts to that end. (R. 120, 206-207).[13]

Similarly, accepting arguendo Petitioner's contention that he was told the grievance had been denied, that certainly does not constitute substantial evidence. To begin with, as the Court of Appeals observed, that would have occurred after the Union decision to withdraw the grievance. Furthermore, Petitioner has in no way contended it might have prejudiced him in any manner. Compare *Bazarte* v. *United Transportation Union,* 429

---

[13]Incredibly, Petitioner now contends that the written statements support his claim that he was not the aggressor in the fight. (Petition at p. 20). Clearly, the statement of the closest eyewitness establishes that Petitioner struck the first blow. (R. 236). Moreover, if nothing else, each of the statements indicates that Petitioner actively participated in the fight. See *Fristoe* v. *Reynolds Metal Co.,* 615 F.2d 1209 (9th Cir. 1980).

F.2d 868 (3rd Cir. 1970). ("Nor is the union's failure to inform plaintiff of its decision not to go forward with the case enough to establish unfair representation, especially since there is no showing that this prejudiced him in any way.")

CONCLUSION

The crux of the present case is that the District Court decision was a glaring misapplication of the legal principles. The Court of Appeals was correct in reversing it and applied the settled legal principles in doing so.

In sum, the Court of Appeals' decision was correct and in full accordance with the governing principles, and it is accordingly submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

Lucien D. Gardner, Jr.
(Counsel of Record)

William F. Gardner

R. Boyd Miller

Attorneys for Respondent O'Neal Steel, Inc.

CABANISS, JOHNSTON, GARDNER, DUMAS & O'NEAL
1900 First National-Southern Natural Building
Birmingham, Alabama 35203
Telephone (205) 252-8800

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief of Respondent O'Neal Steel in Opposition to Petition has been served by United States mail, postage prepaid, on Mr. Ralph E. Coleman, Suite 1311, 2121 Building, 2121 8th Avenue North, Birmingham, Alabama 35203, George C. Longshore, Cooper, Mitch & Crawford, Suite 201, 409 North 21st Street, Birmingham, Alabama 35203, and Mr. David M. Silberman, Bredhoff, Gottesman, Cohen & Weinberg, 1000 Connecticut Avenue, N.W., Washington, D.C. 20036.

This the 17th day of September, 1980.

William F. Gardner